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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH R. FORTNER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

JAY L. COHEN
Lieutenant Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

ROBERT A. PARKS
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

QUESTIONS PRESENTED

1. Whether the military judge erred to the substantial prejudice of the petitioner by permitting, over defense objection, trial counsel to introduce evidence regarding a post-polygraph interview of petitioner, the clear import of the evidence being that petitioner had undergone and "failed" an OSI polygraph.

2. Whether the method of appointing military officers to duty as trial and appellate judges violates the appointments clause of the Constitution and the lack of any fixed term for those judicial offices violates the due process clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
TABLE OF AUTHORITIES	iii
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF PETITIONER BY PERMITTING, OVER DEFENSE OBJECTION, TRIAL COUNSEL TO INTRODUCE EVIDENCE REGARDING A POST-POLYGRAPH INTERVIEW OF PETITIONER, THE CLEAR IMPORT OF THE EVIDENCE BEING THAT PETITIONER HAD UNDERGONE AND "FAILED" AN OSI POLYGRAPH	7
II. THE METHOD OF APPOINTING MILITARY MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT	12
CONCLUSION	15
APPENDIX A	1a
APPENDIX B	7a

TABLE OF AUTHORITIES

Cases:	Page
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	12
Freytag v. Commissioner, 111 S. Ct. 2631 (1991)	12
Matthews v. Eldridge, 424 U.S. 319 (1976)	7, 14
Medina v. California, 112 S. Ct. 2572 (1992)	7
Palmore v. United States, 411 U.S. 389 (1973)	7
Tumey v. Ohio, 274 U.S. 510 (1927)	15
United States v. Agurs, 427 U.S. 97 (1976)	11
United States v. Raddatz, 447 U.S. 667 (1980)	14
United States v. Valenzuela-Bernal, 458 U.S. 869 (1982)	11
United States ex rel. Toth v. Quarles, 350 U.S. 11	7
Federal Cases:	
United States v. Miller, 874 F.2d 1255 (9th Cir. 1989)	9-10
Military Cases:	
Dettinger v. United States, 7, MJ 216 (CMA 1979)	6
United States v. Abeyta, 25 MJ 97 (CMA 1987)	10
United States v. Brown, 28 MJ 470 (CMA 1989)	6
United States v. Cole, 31 MJ 270 (CMA 1990)	6
United States v. Fortner, 37 MJ 349 (CMA 1993)	11
United States v. Gipson, 24 MJ 246 (CMA 1987)	8, 9
United States v. Graf, 35 MJ 450 (CMA 1992)	6
United States v. McKinnie, 29 MJ 825 (ACMR 1989)	8
United States v. Travers, 25 MJ 61 (CMA 1987)	10
United States v. Weiss, 36 MJ 224 (CMA 1992), *cert. granted*, 113 S.Ct. 2412 (May 24, 1993)	7, 12
United States v. West, 27 MJ 223 (CMA 1988)	8

TABLE OF AUTHORITIES—Continued

Constitutional Provisions: Page

U.S. Const. Art. II, § 2, cl. 2 12

U.S. Const. amend. V 2, 7, 12, 14

Federal Statutory Provisions:

Uniform Code of Military Justice:

Art. 48, 10 U.S.C. § 848 6

Art. 66, 10 U.S.C. § 866 6

Regulations:

Manual for Courts-Martial, United States, 1984, RCM 1002 6

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph R. Fortner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on August 18, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 37 MJ 349 (CMA 1993) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on March 11, 1992 is reported at 34 MJ 836 (AFCMR 1992) (Appendix B).

JURISDICTION

The final opinion of the United States Court of Military Appeals was entered on August 18, 1993. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of the law . . .

STATEMENT OF THE CASE

At the time of the offenses of which petitioner was convicted, petitioner was staying at his brother's house in Denver, Colorado. (R. 130). Petitioner, along with other relatives of petitioner's brother's wife had gathered at the house in an effort to provide moral support to petitioner's brother's wife, who was in Fitzsimmons Army Medical Center suffering from leukemia. (R. 40). Present in the house were petitioner; petitioner's brother, Sergeant First Class John Fortner; SFC Fortner's 15 year old daughter—Lisa; petitioner's cousin, Billy Makin; petitioner's mother; and two brothers of petitioner's sister-in-law. (R. 42).

Lisa, the minor with whom the offenses were alleged to have been committed, is a teenager who has a history of trouble with her parents. (R. 58). This trouble included running away from home (R. 58); use of various illegal drugs, to include marijuana, cocaine and LSD (R. 76-77); lying (R. 77); stealing and forging her parents' checks (R. 60); and, in collaboration with a boyfriend, theft of her parents' car. (R. 60). In her testimony at trial, Lisa was unable to provide any details regarding the acts, except that petitioner and she had

engaged in sexual intercourse. (R. 49). She was unable to testify regarding whether petitioner had undressed her or if petitioner had in any way touched her except during intercourse. (R. 47-48). Lisa's testimony regarding the details of who was in the house at the time of the incidents and how she had gone downstairs on the evening of the second offense, were contradicted by petitioner and other witnesses. (R. 72 and 170). Lisa did not allege the conduct by petitioner until a month after the date the offenses were to have occurred. (R 59). No medical evidence regarding the offense was available. At the time Lisa made her report she was in trouble with her parents for running away again and for stealing her parents' car and checkbook as well as for forging a check. (R. 61). Following her report of the petitioner's acts, Lisa's relationship with her father improved. (R. 61).

On 21-22 February 1990, the petitioner was tried by general court-martial at Mather AFB, California. At trial, the prosecution introduced the testimony of a psychiatrist, who testified that Lisa was suffering from post traumatic stress disorder. (R. 84-85). The doctor also opined that Lisa had been molested as a small child. (R. 89). In contrast to Lisa's allegations, petitioner has steadfastly maintained his innocence before, during and after his conviction. The only real contention to the contrary, offered by the prosecution, is a statement made by petitioner to his 20 year old cousin, Billy Makin, prior to the dates the offenses were to have occurred. The statement *was* made by petitioner, after being informed by Makin that Makin had engaged in sexual intercourse with Lisa. Petitioner said, in an effort to lighten the situation and relieve some of his cousin's obvious guilt, "what if I told you that I did too." (R. 99). Petitioner then added, after observing Makin's response to the comment, "I'm just kidding, just joking." (R. 99). Petitioner explained both the intent and context of the statement during his direct testimony. (R. 136).

During cross-examination of petitioner, trial counsel asked petitioner about a post-polygraph interview. (R. 164). While defense counsel objected to any mention of such a session, the military judge, giving defense counsel the opportunity to renew the objection later, ultimately overruled the objection. (R. 164). Trial counsel then elicited from petitioner that the OSI agent in the post-polygraph interview told petitioner that "maybe it was time to tell your [petitioner's] attorneys the truth." (R. 165). Petitioner then corrected the statement by saying that the agent's exact words were "I think you should go back and tell your attorney the truth." (R. 165). Defense counsel again objected to the entire line of questioning, even if the specific words of petitioner were not "necessarily incriminating." (R. 165). The military judge opined that the evidence was admissible and overruled the objection. (R. 165).

Contrary to his pleas, petitioner was found guilty of two specifications of carnal knowledge with his niece, a female under 16 years of age, in violation of Article 120, Uniform Code of Military Justice [hereinafter cited as UCMJ]. He was sentenced to a bad conduct discharge, confinement for 12 months, forfeiture of $400.00 per month for 12 months and reduction to the lowest enlisted grade (E-1). The convening authority approved the sentence as adjudged on 26 March 1990.

On 11 March 1992 the Air Force Court of Military Review affirmed the finding of guilty as to specification 1 but found the evidence factually insufficient to support a finding of guilty as to the remaining carnal knowledge specification. (Appendix B). As a result, the Court set aside the finding of guilty and dismissed specification 2 of the Charge. The Court then reassessed the sentence approving only so much of the sentence as provides for a bad conduct discharge, confinement for one year, and reduction to E-1. Petitioner then submitted a Peti-

tion for Grant of Review with the United States Court of Military Appeals asserting one issue of error. On October 2, 1992, that Court granted petitioner's Petition and ordered the submission of additional briefs. After hearing oral argument, the Court of Military Appeals affirmed the lower court's decision. (Appendix A).

With respect to the second question, this petition incorporates essentially the same brief which was submitted by United States Navy counsel in *Weiss v. United States*, No. 92-1482, and by United States Army counsel in *Barkley v. United States*, No. 92-1646, and *Doucette v. United States*, No. 93-68. Like *Weiss*, this petition raises two closely related questions (merged here into Question 2) which go to the heart of judicial independence for military trial and appellate judges, almost all of whom are commissioned officers and lawyers on active duty. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed for fixed terms.

Instead, military judges are selected and appointed by the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General determines. The decision to select, transfer and reassign officers to and from their judicial duties is absolute and discretionary. In other words, those judges lack any protection from being removed and/or reassigned in the event the Judge Advocate General is not satisfied with their opinions, rulings or service.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in

the American legal tradition. *United States v. Graf*, 35 MJ 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." UCMJ Art. 48, 10 USC § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal sentencing guidelines. *See United States v. Brown*, 28 MJ 470, 474 n.3 (CMA 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 MJ 216 (CMA 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence. . . . as it finds correct in law and fact . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." UCMJ Art. 66(c), 10 USC § 866(c) (1988).

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's claims with respect to judicial appointment and tenure. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 MJ 450 (CMA 1992).[1] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appoint-

[1] A petition for writ of certiorari in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the due process issue.

ments Clause argument and affirmed the Navy-Marine Corps Court's decision. *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, 103 S. Ct. 2412 (May 24, 1993).

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 US 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 US 11 (1955), and *Palmore v. United States*, 411 US 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precluded fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C., area, or for courts-martial that are held in peacetime.

REASONS FOR GRANTING THE WRIT

I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF PETITIONER BY PERMITTING, OVER DEFENSE OBJECTION, TRIAL COUNSEL TO INTRODUCE EVIDENCE REGARDING A POST-POLYGRAPH INTERVIEW OF PETITIONER, THE CLEAR IMPORT OF THE EVIDENCE BEING THAT PETITIONER HAD UNDERGONE AND "FAILED" AN OSI POLYGRAPH

At trial, the critical issue was whether the carnal knowledge ever occurred. Lisa said that it did, (R. 49), and petitioner denied that the conduct ever occurred. (R. 135 and 139).

Since there were no witnesses to the alleged conduct, everything came down to the credibility conflict between the prosecutrix and petitioner. During cross examination of petitioner, trial counsel obliquely introduced information regarding an OSI polygraph taken by petitioner.[2] No foundation was laid for this test, nor was any further information regarding the polygrapher or the instrument itself ever introduced.

In *United States v. Gipson* 24 MJ 246 (CMA 1987), this Court addressed the uses of polygraphs in courts-martial and ruled that polygraph results were not *per se* inadmissible. In *United States v. West*, 27 MJ 223 (CMA 1988), the Court explained that its earlier decision did not mean that polygraph results were *per se* admissible. Instead, "polygraph results must be evaluated under the entire spectrum of evidentiary rules." *Id.*, at 225. Under the facts of the instant case there was no evaluation of the reliability of the test nor its results. Thus, no foundation was ever set forth regarding the polygraph conducted upon petitioner. Perhaps, this is because rather than trying to introduce the polygraph and the polygrapher's interpretation of the test results, trial counsel referred to the ultimate conclusion reached by the polygrapher and needed nothing else.

In *United States v. McKinnie*, 29 MJ 825 (ACMR 1989), the Army Court of Review opined that the admissibility of polygraph results turns upon whether the evidence is relevant and whether it is helpful to the factfinder and whether its probative value is substantially outweighed by its prejudicial effect. The problem in the case *sub judice* is that no informa-

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[2] The petitioner was arraigned on 21 February 1990, prior to the effective date of the promulgation of Mil. R. Evid. 707 (6 July 1991) which provides that results of polygraph examinations are inadmissible in courts-martial in any way. It is arguable, however, that this case provides one of the specific scenarios the drafters sought to rectify by enforcing a total ban on the use of polygraph results.

tion of any type was ever introduced regarding the polygraph itself. Instead, the evidence was the single statement by the polygrapher during the postpolygraph interview. Thus, no findings were made by the military judge regarding any of the criteria supporting admissibility of the polygraph results. *See, Gipson,* 255 (Evertt, C.J. concurring) ("Obviously the training, experience, and skill of the polygrapher must be taken into account by the judge."). In other words, we are left with the naked, untested, and untestable, clearly evident, assertion that petitioner lied to his attorney at the time of the polygraph and was lying on the stand when he denied that the acts in question ever occurred. This conclusion clearly violates the limitation that "[a]t best, the expert [or someone conveying information arrived at by the expert] can opine whether the examinee was being truthful or deceptive in making a particular assertion *at the time of the polygraph exam.*" *Gipson,* at 253 (emphasis in original).

As the above recited facts clearly indicate, trial counsel was permitted to introduce, over defense objection, evidence regarding a post-trial polygraph interview, which reveals that an OSI polygraph was conducted on the petitioner. The real prejudice from this revelation lies in the combination of the existence of the polygraph and the statement of the OSI agent that petitioner should tell his attorneys the truth. The only conclusion to be drawn from this combination is that petitioner had failed an OSI polygraph. This revelation and the prejudice flowing from it is not mitigated by trial defense counsel's assertion that the statement by petitioner was not necessarily incriminating. The incriminating evidence, and the source of the prejudicial error, is the combination of the existence of the polygraph and the OSI agent's comment for which there is no other reasonable interpretation than the petitioner's test resulted in a finding of deception indicated.

The concept of subtly introducing the unfavorable results of a polygraph is hardly new. In *United States v. Miller,* 874 F.2d

1255 (9th Cir. 1989), the Court rooted out the fact that the prosecutor asked a polygrapher about the questions and answers to indirectly show the result of the exam. Furthermore, the Court divined that "[t]he operative fact the government sought to establish through the polygraph evidence was that Miller's admissions were reliable because he decided to make them only after being told that he had failed the polygraph." *Miller,* 874 F.2d at 1262. This is strikingly similar to the case at bar where the government counsel sought to impermissibly tip the balance of the credibility scales by introducing the *polygrapher's* statements through the cross-examination of the petitioner.

The prejudice resulting from the receipt of this evidence by the military judge, who stated "I think it's admissible," is obvious given the nature of the credibility contest in this trial. (R. 165). There was no corroboration of Lisa's claims: no physical evidence; a month between the date the incident was to have occurred and the date that she reported it; and a motive to lie, found in the attempt to improve her standing with her father and diverting attention from herself after stealing the car and checks and forging a check. It cannot be said that the erroneous admission of the polygraph results, via the questions of trial counsel, were harmless. Furthermore, under the standards announced in *Gibson, supra, West, supra,* and *United States v. Abeyta,* 25 MJ 97 (CMA 1987), the military judge's admission of the polygraph results, even by the back door as was effected here, is clearly erroneous and constituted an abuse of discretion. *See, United States v. Travers,* 25 MJ 61 (CMA 1987) (The challenged action must be found to be, *inter alia,* clearly unreasonable, clearly erroneous or without evidentiary support. *Id.,* at 63).

Despite the state of the evidence, the Court of Appeals felt that the evidence was too attenuated to show prejudice in a judge alone trial.

> Suffice it to say, we are supremely confident that the military judge engaged in no such farfetched speculation and that he paid no heed whatever to any supposed implication in the polygrapher's hearsay statement to appellant. We are equally confident that no plain error or prejudice occurred here.

United States v. Fortner, 37 MJ 349, 351 (CMA 1993). Of course, as this Honorable Court has opined,

> [t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Valenzuela-Bernal, 458 US 869, 868 (1982) (quoting *United States v. Agurs,* 427 US 97, 112-3 (1976)). As already noted, one of the specifications petitioner was convicted of was dismissed for being factually insufficient. There was an intense credibility battle going on, with plenty of ammunition on the petitioner's side. To dismiss the petitioner's claim simply because the prejudice occurred in a judge-alone trial is not consistent with this Honorable Court's injunction to reexamine the entire record and to do so with the mindset that the validity of one conviction of carnal knowledge had *already been dismissed* because it was not fully supported by the facts—the same facts which underlay the conviction now being examined. Even evidence of "relatively minor importance" must be given complete and proper weight. The decision of the Court below does not indicate such review was undertaken. As such, it is critical to due process to reexamine this case and grant review of the decision below.

II. THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

This petition, like *United States v. Weiss,* seeks to establish minimum standards for the appointment of military judges and their retention in office for fixed terms. It does not seek to have the Uniform Code of Military Justice or the military justice mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment, are available to those who are tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every just system requires.

A. The Appointments Clause Violation

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. US Const. Art. II, § 2, Cl. 2, *Freytag v. Commissioner,* 111 S. Ct. 2631 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo,* 424 US 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford

and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers must be made by one of the authorities set forth in that clause.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who serve in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the due process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

B. The Due Process Violation

The reasons the Court should grant review on this question are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two issues presented in this question arise under different

constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military judges, yet he is also responsible for supervising the efficient working of the military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 US 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loomed so large in *Medina*, have no place where federal due process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other claimed protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and

virtually undetectable chilling influences of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility to involuntary early retirement for all military judges.

The Court below has failed to justify this massive exception to the generally accepted principle of American jurisprudence that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for an accused, as reflected in such due process cases as *Tumey v. Ohio*, 274 US 510 (1927), and in the nearly universal fact that state judges serve for fixed terms of office.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is crucial because it strikes at the heart of our adversarial system of justice: do we hold the prosecutorial arm of our system to their high burden of fundamental fairness, or do we reward the trial counsel's tactics of "shoe-horning" the results of the polygraph into evidence before the members. The failure of the military judge to disallow such a tactic is error which amounts to a clear abuse of discretion. This error was not harmless as the Court of Military Appeals reasoned, because of the tenuous nature of the evidence of this case. It is especially critical where it tipped the scales of credibility enough to account for the petitioner's sole remaining conviction. Surely, this Honorable Court does not wish to condone this type of activity. This case provides an excellent opportunity to redefine the parameters of governmental conduct within the military justice system, and to

reaffirm the basic tenets of fundamental fairness which are crucial to *any* respected judicial system.

Respectfully submitted,

JAY L. COHEN
Lieutenant Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

ROBERT A. PARKS
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

November 1993

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 68,009.
CMR No. 28446.

UNITED STATES, APPELLEE

v.

JOSEPH R. FORTNER, SENIOR AIRMAN
U.S. AIR FORCE, APPELLANT

Argued April 7, 1993.
Decided Aug. 18, 1993.

For Appellant: *Captain Robert A. Parks* (argued); *Colonel Terry J. Woodhouse* (on brief); *Colonel Jeffrey R. Owens, Major Mary C. Yastishock, Major Alice M. Kottmyer, Captain Richard W. Aldrich.*

For Appelle: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Opinion of the Court

COX, Judge:

The issue in this case is whether the opinion of a polygrapher that appellant had lied during a polygraph examination

was improperly smuggled into evidence by the Government.[1] We agree that such an implication was presented. However, under the circumstances of this case, there is no possibility that appellant was prejudiced. *See* Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

Appellant was tried on February 21-22, 1990, at Mather Air Force Base, California, by a military judge sitting alone as a general court-martial. Contrary to his pleas, he was convicted of two specifications of carnal knowledge with his 15-year-old niece, in violation of Article 120, UCMJ, 10 USC § 920.[2] The evidence against appellant consisted primarily of the testimony of the victim; the testimony of a cousin (who also admitted having carnal knowledge with the victim) that appellant had made an admission to him and had attempted to influence him to not admit his own misconduct or report appellant's and to not testify; and evidence of the victim's post-traumatic stress disorder and marked psychiatric change at about the time of the alleged events.

The evidence here in issue came about during cross-examination of appellant, wherein trial counsel raked appellant over

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[1] The granted issue asks:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY PERMITTING, OVER DEFENSE OBJECTION, TRIAL COUNSEL TO INTRODUCE EVIDENCE REGARDING A POST-POLYGRAPH INTERVIEW OF APPELLANT, THE CLEAR IMPORT OF THE EVIDENCE BEING THAT APPELLANT HAD UNDERGONE AND "FAILED" AN OSI POLYGRAPH.

[2] The military judge sentenced appellant to a bad-conduct discharge, confinement and forfeiture of $400 pay per month for 1 year, and reduction to E-1; and the convening authority approved the sentence. The Court of Military Review set aside the finding of guilty of one of the specifications and dismissed it on the grounds of insufficiency of evidence. Reassessing the sentence, that court affirmed only so much of the sentence as provided for a bad-conduct discharge, confinement for 1 year, and reduction to E-1. 34 MJ 836, 841 (1992).

the coals about his semi-admitted attempts to silence his cousin. Abruptly switching gears, trial counsel launched into the sequence of questions and answers in issue, repeated here in its entirety:

> Q: [TC] Do you remember having a conversation with Agent Pulliam at Travis Air Force Base? Remember talking to him.
>
> ADC: Your Honor, I'm going to object at this point.
>
> TC: I'm not going to go into any matters that are inadmissible.
>
> ADC: Your Honor, I would still object. I don't know where counsel is going; and if she's getting—will, let me let Captain Dowling address that matter because he was on the case at the time before I was.
>
> DC: Your Honor, I think defense's position is that we're just getting into an area dealing with a post-polygraph conversation between the special agent from the OSI and Airman Fortner which was told to them in letter and by me, myself over the phone that no such post-polygraph conversation should occur and that would be our objection.
>
> MJ: You are asserting that you did communicate that to OSI agents that they were not to have a post-polygraph conversation with your client, is that right?
>
> DC: In letter form and over the phone.
>
> MJ: Then I'm going to sustain the objection. If they did that contrary to your instructions, I'll sustain that objection.
>
> TC: One moment, sir.
>
> MJ: Well, wait a minute. What is your position? Was he under a proper rights advisement?
>
> TC: He was under rights advisement, sir, and it wasn't an interview. I believe the proper term is a post-polygraph interview and this was not an interview, it was a

comment and an answer which is what I was trying to—the polygrapher asked him no questions and it was—

MJ: I'll permit the question, but feel free to renew; and if it is improper, feel free to renew your objection and I can, of course, disregard because this is a bench trial. Go ahead.

By Trial Counsel:

Q. *Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth?*

A. *His exacts [sic] words were, I think you should go back and tell your attorney the truth.*

Q. And do you remember saying, yeah, maybe I should?

A. I said, yes, I will.

Q. But you didn't, did you?

A. Yes, I have been, and I'm still maintaining the truth, ma'am.

TC: Thank you, nothing further.

MJ: Is there redirect?

ADC: Your Honor, prior to redirect, what I'd like to do is I would like to reimpose that objection that there were strict instructions that there was to be no post-polygraph interview. While this was not a question per se, *it falls into that category of a statement obviously meant to elicit a response and while we don't feel that the response is necessarily incriminating, it is a statement or technicality, a statement that we feel was made in an interrogation setting.*

MJ: No, I think it's admissible. I agree with you, and I'm not sure it's probative of anything, but I think it's admissible evidence, so I'm going to overrule the objection.

(Emphasis added.)

Appellant now complains that the opinion of the polygrapher (*i.e.*, that appellant had lied during the polygraph) was "obliquely introduced" into *evidence* through trial counsel's *question*: "Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth?" We agree that the implication that appellant was being less than candid during the polygraph examination is derivable from the question and that asking appellant to verify that the statement was made in that particular context placed the matter, and the potential inference, into evidence. However, the record cannot fairly be read to suggest that counsel's objection went to any implied opinion in the polygrapher's statement. Plainly, counsel and the military judge were both focused on the "response" "elicit[ed]," which happened to be nonincriminatory. Thus, the issue, to be cognizable, would have to amount to "plain error." *United States v. Fisher*, 21 MJ 327 (CMA 1986).

In that regard, we note that this case was tried well after our opinion in *United States v. Gipson*, 24 MJ 246 (CMA 1987), where we made it abundantly plain that any party wishing to introduce the results of a polygraph test or an opinion as to truth by a polygrapher had substantial foundational prerequisites to satisfy.[3] We have no reason to doubt that the military judge was well acquainted with our *Gipson* decision, and needless to say, there was absolutely no effort on the part of the prosecution to establish the relevance of the polygrapher's opinion in this case.

---

[3] This case was tried prior to July 6, 1991, the effective date of Mil.R.Evid. 702, which purports to ban from admission at courts-martial "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination." Exec. Order No. 12767, 56 Fed.Reg. 30284, 30295-96, 30299 (1991).

Further, the record does not disclose, and presumably the military judge did not know, what questions were asked by the polygrapher. Therefore, even if for some unimaginable reason the military judge were to have credited this polygrapher's alleged opinion in the slightest degree, the judge would have been forced to speculate wildly as to what appellant was supposed to have lied about. Moreover, appellant had earlier been forced to concede in his trial testimony that he had lied outright under oath in his pretrial (and pre-polygraph) statement to law enforcement officials. Therefore, the most fanciful theory of prejudice evaporates, for even if the judge noticed the polygrapher's presumed belief that appellant lied during the polygraph exam, that belief may well have been predicated on matters later admitted by appellant at trial. Suffice it to say, we are supremely confident that the military judge engaged in no such farfetched speculation and that he paid no heed whatever to any supposed implication in the polygrapher's hearsay statement to appellant. We are equally confident that no plain error or prejudice occurred here. *United States v. Fisher, supra*; Art. 59(a).

We confess to perceiving no possible relevance in appellant's *response* to the polygrapher's statement, but like defense counsel and the military judge, we perceive no possible prejudice either. Art. 59(a).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and Wiss, JJ., CONCUR.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 28446.

UNITED STATES

v.

SENIOR AIRMAN JOSEPH R. FORTNER, FR316-60-7799
UNITED STATES AIR FORCE.

Sentence Adjudged 22 Feb. 1990.
Decided 11 March 1992.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Ronald G. Morgan.

Appellate Counsel for the United States: Colonel Robert E. Giovagnoni and Captain James C. Sinwell.

Before LEONARD, RIVES, and JAMES, Appellate Military Judges.

OPINION OF THE COURT

LEONARD, Senior Judge:

Contrary to his pleas, appellant was convicted in a bench trial of two offenses of committing carnal knowledge with his 15-year-old niece. His adjudged and approved sentence includes a bad-conduct discharge, confinement for 1 year, forfeiture of $400 pay per month for 12 months, and reduction to E-1. In his

appeal to us, he raises five issues. We find merit in one issue and set aside one carnal knowledge conviction.

I. Sufficiency of the Evidence

We first examine appellant's assertion that the evidence in the record is insufficient to support his convictions. To dispose of this issue, we begin with a discussion of the complicated fact pattern.

A. Facts

Appellant entered the Air Force in April 1986 and was assigned as an intelligence specialist at Mather Air Force Base, California. Over the next 3 years, his military record reflects outstanding duty performance meriting distinctive recognition on several occasions. At the time of the incidents for which he was convicted, appellant was 26 years old and single.

On 28 April 1989, appellant traveled to Denver, Colorado, on emergency leave to visit his sister-in-law, who was hospitalized with leukemia. During his visit, he stayed with his brother's family at their house. Present were both of his brother's daughters, ages 15 and 17. The younger of the two is the victim in this case. Additionally, the appellant's mother (the victim's grandmother), an adult male cousin B, and other members of appellant's extended family were visiting at the same time.

On the night of 29 April, the victim and cousin B partied together, drank heavily, and engaged in sexual intercourse in the basement of the victim's house. The following day, the victim arose around noon and met appellant in the living room with other family members. Throughout the afternoon, she rested on the couch. Late in the afternoon, the remaining family members left the house to visit appellant's sister-in-law and were gone for about an hour. Feeling ill, the victim stayed behind and continued to rest on the couch. Appellant remained with her.

According to the victim, once the others were gone, appellant began kissing her "romantically." Shortly thereafter, he asked her to accompany him to the basement, where he spread a blanket on the floor, and the two laid down and had sexual relations. According to the victim, appellant then told her not to tell anyone of the incident. In sworn testimony on findings, appellant denied the incident ever occured, maintaining that the victim remained asleep on the couch during the entire period the others were away.

Later that evening, appellant and cousin B went together to a video rental outlet. On the way, Cousin B confided in appellant out of a sense of guilt about his sexual relations the previous night with the victim. Appellant responded, "What would you say if I told you I did too." After a pause, appellant stated that he was joking. At trial appellant admitted he had made the remark, but said he did so to "lighten up the moment."

According to the victim, on the evening of 1 May (the next day), appellant asked the victim to meet him again in the basement in the middle of the night. She stayed up alone in her room listening to the radio until about 1 a.m. the next morning. She then made her way in the dark through the living room, where other family members were sleeping, to the basement. There she found appellant waiting, and once again the two had sexual relations. According to the victim, appellant again told her not to tell anyone. During his testimony, appellant denied that the second incident ever occured.

The victim's account of remaining in her room alone listening to the radio conflicts with the testimony of the victim's sister that the two girls were sleeping in the same room that night. Similarly, the victim's version of her descent in darkness through the living room to the basement is contradicted by other witnesses. According to both cousin B and the victim's grandmother, two of the family members she identified as sleeping in the living room that night had already left town. Cousin B also testified that in order for the victim to have passed through the

living room, she would had to have stepped over him or climbed over the furniture. He stated further that although he is a light sleeper, he was not disturbed that night.

On 2 May, the victim ran away from home for a week. She first reported her sexual encounters with appellant about a month later to a mental health worker at a psychiatric hospital where she had previously been institutionalized.

Cousin B testified that following his admission of sexual misconduct to appellant, both appellant and appellant's mother repeatedly pressured him not to talk with investigators. When appellant found out that cousin B had confessed to sexual misconduct, appellant told him that he had betrayed appellant. On the morning cousin B was scheduled to testify at trial, appellant inquired whether he intended to testify and stated, "You might as well put the cuffs on me yourself."

The court heard considerable testimony bearing on the victim's credibility. Evidence was admitted that the victim suffered serious substance abuse problems—both of alcohol, and drugs, including marijuana, cocaine, and LSD. Additionally, the victim had a history of deliquency and disciplinary problems at home. As to her reputation for truthfulness, the victim's grandmother testified that it was "no good." The victim' father testified that she would be honest "as to a major issue when finally confronted."

B. Analysis and Law

Under Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. § 866(c), this court has the duty to evaluate the evidence to insure it is both legally and factually sufficient to support any conviction. The Court of Military Appeals has clearly defined the standards for reviewing the evidence:

> The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the

> prosection, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A.1987).

Viewing the evidence in the light most favorable to the prosecution, we determine it to be legally sufficient to support the court's findings on both specifications. However, exercising our powers of factual review, we come to a different conclusion.

We first examine the specification charging the 30 April offense. Though we have concerns about the victim's credibility, we note that the judge viewed her testimony and found her to be believable. Hence, making allowances for having not been present in the courtroom, we find the evidence to be factually sufficient to support the conviction.

Examining the evidence of the 1 May offense, we arrive at a contrary conclusion. Our concerns extend beyond witness credibility to the factual consistency of key portions of the victim's story vis-a-vis the testimony of witnesses other than appellant. Her account of what occured immediately prior to her second sexual encounter with appellant conflicts with the testimony of every other witness—government and defense—who recounted what happened that evening. The cumulative effect of these factuals inconsistencies, coupled with our concerns regarding the victim's credibility, cause us to have a reasonable doubt that the appellant committed the charged offense on May 1.

II. Comments of Trial Counsel on Cross-Examination

Appellant contends that the military judge erred in permitting the trial counsel to act as a "human lie detector" during cross-examination of appellant. The assigned error refers to the following discourse:

> Q. Airman Fortner, I don't know how much training you have had in this, but sometimes when people don't tell the truth they do funny things, they fidget or they pull on their ear after they lie or their face gets red when they lie. Are you familar with that and does that make sense?
>
> A. Yes, ma'am.
>
> Q. Do you know what it is that you do when you lie?
>
> A. I'm not lying.
>
> ADC: Objection, Your Honor.
>
> TC: I asked a simple question.
>
> MJ: I think it's fair cross. I'm going to overrule the objection.
>
> By Trial Counsel:
>
> Q. Do you know what it is?
>
> A. That I do?
>
> Q. Mm-hmm.
>
> A. Not in particular, ma'am.
>
> Q. Would you be surprised to know that everytime you deny sleeping with [the victim], that you blink a lot right afterwards, but that when you talk about things like going to dinner and having spaghetti, you can look anybody in the face and talk about that all day without blinking. Does that surprise you?
>
> A. No, ma'am, because I'm not lying.
>
> Q. It doesn't surprise you then that you blink a lot when you talk about not having sex with [the victim] and that you don't blink when you talk about having dinner in the Italian restaurant?

A. Should it ma'am?
Q. Should it surprise you?
A. It doesn't, because I'm telling the truth.

We find the trial counsel's comments to be improper in this case. Noting the mannerisms of a witness for the record is permissible at the discretion of the military judge.[1] *Cf. United States v. Miller*, 14 M.J. 924,925 (A.F.C.M.R.1982)(the failure to record facial gestures or body language does not render a record incomplete). However, the trial counsel went beyond this, expressing a personal opinion regarding the truthfulness of appellant's testimony.

Judging the credibility of evidence remains solely within the province of the finder of fact. It is well established that witness testimony expressing an opinion on the truthfulness of another's statement is not admissible at trial. *United States v. Adkins*, 5 U.S.C.M.A. 492, 18 C.M.R. 116(1955); *United States v. Wagner*, 20 M.J. 758 (A.F.C.M.R.1985). Additionally, the role of the expert witness has been carefully confined to avoid testimony as a "human lie detector." *United States v. Partyka*, 30 M.J. 242 (C.M.A.1990); *United States v. Tolppa*, 25 M.J. 352 (C.M.A.1987); *United States v. Petersen*, 24 M.J. 283 (C.M.A.1987); *United States v. Cameron*, 21 M.J. 59 (C.M.A.1985).

In the past, this Court has specifically held that the interpretation of body language is not the proper subject of testimony. *United States v. Clark*, 12 M.J. 978, 979 (A.F.C.M.R.1982). Furthermore, counsel may not argue their personal opinions

[1] We note that after the adverse ruling on the objection, defense counsel used this tactic to his advantage:

> ADC: Your Honor, can we let the record reflect that on those last three answers, Airman Fortner was not blinking.

While ordinarily it would not be proper to record the absence of facial gestures or other body language, it was appropriate under these circumstances.

regarding truthfulness of the testimony of any witness, particularly the accused. *v. Knickerbocker*, 25 U.S.C.M.A. 346, 54 C.M.R. 1072, 2 M.J. 128 (1977).[2] It follows that during examinatino of a witness, counsel may not weave a personal assessment of the witness' body language into the content of the questions. Hence, we find the military judge abused his discretion by overruling the defense objection and permitting this line of questioning. However, we consider any prejudice that may have flowed from this error rectified by our disapproval of one of appellant's convictions.

III. Improper Rebuttal

Appellant also complains that the military judge erred by permitting trial counsel to introduce improper rebuttal evidence. During cross-examination of appellant's mother, the following dialogue occurred:

> Q. Do you remember talking to your son, [the victim's father], Monday night?
>
> A. Mm-hmm.
>
> Q. Do you remember what you told him about this particular offense?
>
> A. I told him that I didn't believe it ever happened and he told me—that he said, to tell you the truth of it, I'm not even sure that it's the truth.
>
> Q. [The victim's father] is trying to stick up for his brother in your eyes, isn't he?
>
> A. I don't know if that's what he was doing. He just said that he couldn't swear to it that she was even telling the truth?

---

[2] Voicing the opinions of counsel in the court-room also raises ethical considerations. A common tenet of professional ethics codes forbids an attorney from stating at trial a personal opinion regarding the credibility of a witness. American Bar Association Model Rules of Professional Conduct, Rule 3.4(e) (1983); *accord,* Air Force Rules of Professional Responsibility, Rule 3.4(e) (1989).

After the defense rested, the government called the victim's father to testify that he had not made the comments at issue. The military judge permitted the testimony over defense objection.

The government may rebut evidence offered by a defense witness that is non-responsive to an inquiry on cross-examination. *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). In this case, the trial counsel's line of questioning was proper cross-examination of appellant's mother. Mil.R.Evid. 608(c). In response to a narrow question designed to elicit her comments made during an out-of-court conversation, she gratuitously offered comments made by the other party to the conversation. There is no indication in the record that the trial counsel engineered the question to extract otherwise inadmissible evidence from the witness or to set her up for rebuttal. *See United States v. Maxwell*, 21 M.J. 229 (C.M.A. 1986). Hence, the military judge's ruling permitting the government to rebut the evidence by direct testimony was not an abuse of discretion. *Trimper*, 28 M.J. at 467.

We find the remaining assignments of error to be without merit.

IV. Reassessment of Sentence

On the basis of our review for factual sufficiency, the finding of guilty to the specification alleging the 1 May 1989 carnal knowledge offense is set aside and dismissed. The findings of guilty to the charge and the remaining carnal knowledge specification are affirmed.

Our modification to the court's findings causes us to reassess the sentence. Relying only on those matters properly before the military judge, we are satisfied that we can determine the sentence the court "would probably have adjudged if the error had not been committed at trial." *United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990); *see United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Reassessing the sentence, we approve only so much of the sentence as provides for a bad-conduct discharge, confinement for 1 year, and reduction to E-1. Considering the entire record, the reassessed sentence is appropriate. Accordingly, the findings of guilty and the sentence, both as modified, are correct in law and fact and are

AFFIRMED.

Judge RIVES concurs.

Judge JAMES dissents:

I disagree with the majority's assessment of the persuasiveness of the evidence, its treatment of the "human lie detector" cross-examination, and its disposition. I would affirm the findings and the sentence.

This case illustrates the requirement of Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988) that we affirm only such findings and sentence as we find correct in law and *fact*. We are explicitly given authority to "weigh the evidence" and "judge the credibility of witnesses," and we do. *Id.* We three have retried this case, and the majority has voted to acquit appellant on one specification. Thus, we sit today as much as jury as we sit as appellate court. When we examine the factual sufficiency of the evidence, we engage in a very subjective review. Thus, it does my colleagues no dishonor to say that I disagree, for the matter must be resolved by each of us individually, beyond a reasonable doubt.

I also disagree with the majority's treatment of the cross-examination. Appellant framed the issue cleverly, suggesting that this court-martial had heard the kind of "human lie detector" *testimony* that has been condemned in other cases.[3] In fact,

---

[3] I note that the illustrative decisions cited by the majority involve efforts to have one witness testify about the credibility of *another*. Furthermore, they were cases in which either an expert or pseudo-expert was asked to do so. It is hardly likely that the majority intends to imply that

it heard no such testimony. It did hear *questions* by the trial counsel that imbedded that kind of thought, but I view that as perfectly acceptable.

Counsel have wide latitude on cross-examination, and credibility is one of the topics to which cross-examination is explicitly dedicated. Mil.R.Evid. 611(b). This trial counsel used a classic technique of cross-examination that is within that wide latitude and especially apt for explorations of credibility: She tried to put words into the witness's mouth and watched to see whether the witness would permit it.[4] This method sometimes shows the witness to be susceptible to manipulation and therefore less credible. Confronting a witness with the witness's tics might, in an exceptional case, demonstrate the witness's demeanor very convincingly, and counsel are entitled to try that tactic if they wish, at least briefly. When they do so, they must do the only thing they are allowed to do on cross-examination: They ask *questions*. There is the central difference between my view and that of the majority: I say trial counsel asked questions, appellant implies that she testified, and the majority says she commented.

It is often taught, in the lurid shorthand used in forensics courses, that it must always be thus, that an effective lawyer does *all* the testifying on cross-examination and the witness merely subscribes. Such a statement effectively communicates the thought intended, but it does so at the cost of accuracy. We all know that lawyers may not testify during examination; witnesses testify. No witness in this case gave "human lie detec-

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it is improper to invite witness X during cross-examination to admit that witness X is unreliable in one respect, many, or all. That is a major objective of many such examinations, though they are the most difficult.

[4] It is not relevant to our disposition that the technique does not seem to have especially well in this case. Trial counsel treid to use an ax instead of a razor, and the witness seems to have seen it coming. Had trial counsel persisted ineffectively, the military judge could certainly have regulated the waste of energy under Mil.R.Evid. 403; R.C.M. 801(a)(3).

tor'' testimony. Though invited to do so by trial counsel's questions, the witness refused to be duped. That should have been the end of this issue.

The time for comment is argument, but no one has complained about any improper comment during arugment. It does not follow from *Clark* that counsel may not comment in argument upon a witness's ''body language''; *Clark* only holds that experts and pseudo-experts may not give *testimony* about their ''body language'' theories of credibility. It would shock the bar to hear that a lawyer may not argue in closing that a witness's behavior during examination suggests dishonesty or less than complete confidence in the answers given. Thus, a ''common experiences of mankind,'' or ''ways of the world'' argument is acceptable, but junk science testimony is not. The crux of the issue is the *Knickerbocker* problem, that counsel may not express their own views. But trial counsel never stated her own opinion. She just asked questions.

To accused trial counsel's *questions* of being comment attributes to the listener the inability to discriminate between a question and an assertion. It is sometimes true in the human experience that listeners cannot do so, but this experienced military judge can be fairly trusted to have discriminated between counsel's question and the witness's reply. Had there been any danger that he would have been impaired, one would have expected defense counsel to complain that the questions were argumentative, but there was no such objection.[5]

I am equally unimpressed with the quibble about the propriety of trial counsel's rebuttal of the gratuitous, nonresponsive answer given during cross-examination by trial counsel. *See* Mil.R.Evid. 402, 403, 611(a); R.C.M. 801(a)(3). The whole matter is hardly a fly-speck in the record. The military judge's decisions were within his discretion, and he did not abuse it.

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[5] It should be evident from my approach to this issue that I have found no place at which trial counsel gave her opinion of the credibility of a witness, and therefore I find no ethical dimension to this case.

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Supreme Court, U.S.
FILED
DEC 16 1993
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No. 93-767

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH R. FORTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Captain, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

QUESTIONS PRESENTED

1. Whether the military judge prejudiced petitioner by permitting the prosecutor to question petitioner about a statement he made to an investigating officer, which petitioner contends could have been taken as indicating that petitioner had undergone and failed a polygraph examination.

2. Whether the method of appointing military officers to duty as trial and appellate judges, and the lack of tenure for those judges, violate the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

United States v. *Bledsoe*, 19 M.J. 641 (A.F.C.M.R. 1984), aff'd, 26 M.J. 97 (C.M.A.), cert. denied, 488 U.S. 849 (1988)	6
United States v. *Burns*, 25 M.J. 817 (A.F.C.M.R.), petition denied, 27 M.J. 1 (C.M.A. 1988)	6
United States v. *Gipson*, 24 M.J. 246 (C.M.A. 1987)	5
United States v. *McKinnie*, 29 M.J. 825 (A.C.M.R. 1989), aff'd, 32 M.J. 141 (C.M.A. 1991)	5
United States v. *Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), cert. denied, 113 S. Ct. 596 (1992)	6
United States v. *Ortiz*, 34 M.J 831 (A.F.C.M.R. 1992)	6
United States v. *West*, 27 M.J. 223 (C.M.A. 1988)	5

Constitution, statute, regulation and rule:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	7
Uniform Code of Military Justice, Art. 120(b), 10 U.S.C. 920(b)	2
Exec. Order No. 12,767, 3 C.F.R. 334 (1992)	5
Mil. R. Evid. 707	5

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-767

JOSEPH R. FORTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 37 M.J. 349. The opinion of the Air Force Court of Military Review (Pet. App. 7a-18a) is reported at 34 M.J. 836.

JURISDICTION

The judgment of the of Military Appeals was entered on August 18, 1993. The petition for a writ of certiorari was filed on November 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted after a general court-martial before a military judge sitting alone. The judge found petitioner guilty of two specifications of carnal knowledge, in violation of Article 120(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920(b). Petitioner was sentenced to a bad conduct discharge, confinement and forfeiture of $400 pay per month for one year, and reduction to the lowest enlisted grade. The convening authority approved the sentence. Pet. App. 2a & n.2. The Air Force Court of Military Review set aside petitioner's conviction on one of the specifications and dismissed that specification for insufficient evidence. Reassessing the sentence, that court reduced it to a bad conduct discharge, confinement for one year, and reduction to the lowest enlisted grade. *Id.* at 2a n.2, 15a-16a. The Court of Military Appeals affirmed. *Id.* at 1a-6a.

The charge that was sustained was based principally on the testimony of the victim, the 15-year-old daughter of petitioner's brother, in whose home petitioner was staying at the time of the offense. The victim testified that she engaged in consensual sexual intercourse with petitioner. A cousin of petitioner's testified that petitioner made a statement about having had sexual relations with the victim. The cousin also testified that petitioner and petitioner's mother placed pressure on him not to talk with investigators who were looking into the matter. Petitioner testified in his own behalf and denied that the incident ever occurred. Pet. App. 2a, 10a-11a.

During the cross-examination of petitioner at his court-martial, the following colloquy took place (Tr. 164-165):

TC [the prosecutor]: Do you remember having a conversation with Agent Pulliam at Travis Air Force Base? Remember talking to him.

ADC [assistant defense counsel]: Your Honor, I'm going to object at this point.

TC: I'm not going to go into any matters that are inadmissible.

ADC: Your honor, I would still object. I don't know where counsel is going; and if she's getting—well, let me let Captain Dowling address that matter because he was on the case at the time before I was.

DC [defense counsel]: Your Honor, I think defense's position is that we're just getting into an area dealing with a post-polygraph conversation between the special agent from the OSI and Airman Fortner which was told to them in letter and by me, myself, over the phone that no such post-polygraph conversation should occur and that would be our objection.

MJ [military judge]: You are asserting that you did communicate that to OSI agents that they were not to have a post-polygraph conversation with your client, is that right?

DC: In letter form and over the phone.

MJ: Then I'm going to sustain the objection. If they did that contrary to your instructions, I'll sustain that objection.

TC: One moment, sir.

MJ: Well, wait a minute. What is your position? Was he under a proper rights advisement?

TC: He was under rights advisement, sir, and it wasn't an interview. I believe the proper term is a post-polygraph interview and this was not an interview, it was a comment and an answer which is what I was trying to—the polygrapher asked him no questions and it was —

MJ: I'll permit the question, but feel free to renew; and if it is improper, feel free to renew your objection and I can, of course, disregard because this is a bench trial. Go ahead.

TC: Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth? Do you remember him saying that?

ACC [the accused]: His exact words were, I think you should go back and tell your attorney the truth.

TC: And do you remember saying, yeah, maybe I should?

ACC: I said, yes, I will.

TC: But you didn't, did you?

ACC: Yes, I have been, and I'm still maintaining the truth, ma'am.

TC: Thank you, nothing further.

MJ: Is there redirect?

ADC: Your Honor, prior to redirect, what I'd like to do is I would like to reimpose that objection that

there were strict instructions that there was to be no post-polygraph interview. While this was not a question per se, it falls into that category of a statement obviously meant to elicit a response and while we don't feel that the response is necessarily incriminating, it is a statement or technically, a statement that we feel was made in an interrogation setting.

MJ: No, I think it's admissible. I agree with you, and I'm not sure it's probative of anything, but I think it's admissible evidence, so I'm going to overrule the objection.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the government improperly introduced evidence suggesting that petitioner had taken and failed a polygraph examination.

Petitioner argues that evidence of the polygraph examination was inadmissible.* Petitioner's analysis of the admissibility of polygraph evidence is irrelevant, however, because evidence of petitioner's polygraph examination was never offered or admitted at trial. The

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* This case was tried prior to July 6, 1991, the effective date of Mil. R. Evid. 707, which bans from admission at courts-martial "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination." Exec. Order No. 12,767, 3 C.F.R. 334, 339-340, 341 (1992). Prior to the effective date of that rule, the Court of Military Appeals had held that polygraph evidence was neither per se inadmissible, see *United States* v. *Gipson*, 24 M.J. 246 (C.M.A. 1987), nor per se admissible, see *United States* v. *West*, 27 M.J. 223, 225 (C.M.A. 1988). Rather, the court had held that polygraph evidence must "be evaluated under the entire spectrum of evidentiary rules." *Ibid.* See also *United States* v. *McKinnie*, 29 M.J. 825 (A.C.M.R. 1989), aff'd, 32 M.J. 141 (C.M.A. 1991).

question asked by the prosecutor did not state or suggest that petitioner had taken a polygraph examination. The question simply asked whether petitioner had been told by a particular law enforcement agent that he should tell his attorney the truth. Petitioner testified that he replied to the agent, "[Y]es, I will." When the prosecutor then asked, "But you didn't, did you?" petitioner replied, "Yes, I have been, and I'm still maintaining the truth." Tr. 165.

Nothing about that exchange suggests that petitioner had taken a polygraph examination, much less that the examiner had concluded that petitioner had failed the examination. It was only the comments of petitioner's counsel in arguing an objection to that line of questioning that indicated that petitioner had taken a polygraph examination and that the exchange with the agent took place after the examination.

In any event, the military judge observed at trial that it was doubtful that petitioner's statement was probative of anything. Accordingly, because this was a bench trial, it is apparent from the judge's comments, as well as the ambiguous nature of petitioner's remark, that the admission of the comment could not have prejudiced petitioner, even if petitioner's objection to the admission of the statement should have been sustained. The Court of Military Appeals was therefore correct in concluding, Pet. App. 5a-6a, that any error in the admission of the evidence of petitioner's response to the agent was nonprejudicial. See *United States* v. *Ortiz*, 34 M.J. 831 (A.F.C.M.R. 1992); *United States* v. *Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), cert. denied, 113 S. Ct. 596 (1992); *United States* v. *Burns*, 25 M.J. 817 (A.F.C.M.R.), petition denied, 27 M.J. 1 (C.M.A. 1988); *United States* v. *Bledsoe*, 19 M.J. 641 (A.F.C.M.R. 1984), aff'd, 26 M.J. 97 (C.M.A.), cert. denied, 488 U.S. 849 (1988).

2. Petitioner next argues (Pet. 12-15) that the military trial and appellate judges in his case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure for the judges in his case rendered the proceedings against him fundamentally unfair.

Those questions are not materially different from the questions presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), which is pending before the Court. Accordingly, we believe that the petition should be held until the Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482, and should then be disposed of as appropriate in light of the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Captain, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

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